IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 24, 2008

STATE OF TENNESSEE v. ARMAND E. BOOKER

Appeal from the Anderson County Criminal Court
No. A4CR302 Donald R. Elledge, Judge

No. E2007-01825-CCA-R3-CD - Filed September 5, 2008

On April 6, 2006, an Anderson County Criminal Court convicted the defendant, Armand E. Booker, of one charge of selling less than .5 grams of cocaine, a Class C Felony. The defendant now appeals, alleging that there was insufficient evidence to support the conviction, that the police and State engaged in outrageous conduct in their dealings with the defendant, that the trial court erred in failing to dismiss the charge because of the State's failure to comply with discovery, and that the trial court erred in not indicating when the defendant's sentence should begin if it was to run consecutively to his two prior sentences. Discerning no error in the judgment of the trial court, we affirm.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDMEYER, JJ., joined.

Robert Jolley, Knoxville, Tennessee (at trial), and F. Chris Cawood, Kingston, Tennessee (on appeal) for the appellant, Armand E. Booker.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General, and Edward P. Bailey, Jr., District Attorney General, for the appellee, State of Tennessee.

OPINION

On April 6, 2006, an Anderson County Criminal Court jury convicted the defendant, Armand E. Booker, of one charge of selling less than .5 grams of cocaine, a Class C Felony. *See* T.C.A. § 39-17-417(c)(2)(A) (2003). The trial court sentenced him as a multiple offender to seven years' incarceration, to be served consecutively to two prior convictions in cases numbered 96CR105 and A0CR405.

At the trial, Bethel Poston, a narcotics investigator for the Oak Ridge police department, testified that on March 18, 2004, he, Officer Brian Yook, and confidential informant Melvin Johnson went to an Amoco station on the corner of Tulsa and Illinois Avenues in Oak Ridge.

At the time, Mr. Johnson had spent six months as a confidential informant, gathering information and making drug purchases for the police department in exchange for money, a place to live, and protection from those he implicated. Officer Poston testified that after dropping Mr. Johnson off near the Amoco station, he and Officer Yook established surveillance from a car less than 100 yards away. In addition to the officers' visual surveillance of the scene, they recorded Mr. Johnson's activity with a video camera, and Mr. Johnson was wearing an audio transmitting device. Mr. Johnson was given thirty dollars to make a drug purchase at the Amoco station. Officer Poston testified that he personally searched Mr. Johnson before dropping him off to make sure he did not have any other money or drugs on his person.

Officer Poston testified that he observed the defendant drive up to the Amoco in a black Nissan Maxima. The defendant got out of the car and exchanged words with Mr. Johnson on his way into the Amoco station. Mr. Johnson stayed outside when the defendant went inside. When the defendant came back outside, more words were spoken, and Mr. Johnson then entered the Maxima with the defendant. Officer Poston testified that he observed the two individuals in the car together for approximately 30 seconds before Mr. Johnson got out and the defendant drove away.

When Mr. Johnson was picked up after his interaction with the defendant, he no longer had the money but had in his possession a small off-white rock. The rock was later transferred to the Tennessee Bureau of Investigation (TBI) crime laboratory for analysis.

Officer Yook testified that Mr. Johnson received fifty dollars for his work on March 18, 2004. On cross-examination, Officer Yook explained that when Mr. Johnson began working as a confidential informant he filled out a "confidential informant packet" with forms explaining "basically who he is, his identity, and some basic rules that he should follow as far as he understands that he is not a law enforcement officer, he does not have the right to carry a weapon or affect arrests." This packet was kept in a secure location because it had personal information and could be used to compromise investigations.

Celeste White testified that she was a drug chemist in the TBI Knoxville Crime Laboratory. Ms. White examined the substance presented to her by the Oak Ridge police department and found it to be cocaine base weighing .3 grams.

Melvin Johnson testified that he was 40 years old and had lived in Oak Ridge since 1997. He testified that he had a problem with cocaine addiction and had been previously been convicted of theft. Mr. Johnson testified that his relationship with the police department began when he was pulled over by a police officer and drug paraphernalia was found in his car. He pleaded guilty to the resulting drug charge and, through that, met some people at the police department. At that time his drug addiction had put him out on the streets, and he had hit "rock bottom and [he] just said to [himself] I'm going to try to change, and that's when I started working with [the police department] . . . trying to, you know, help get drugs off the street."

Mr. Johnson testified that on March 18, 2004, Officer Yook dropped him off at the corner by the Amoco station with no personal belongings except his house key. Officer Poston

searched him to make sure he did not have any other items on him and gave him $30 to buy cocaine from anyone who might be selling drugs around the Amoco. Mr. Johnson testified that he had been buying drugs in the Oak Ridge area for three or four years at that point and had bought drugs at this Amoco station on "many occasions" in the past.

Mr. Johnson testified that he approached the defendant when he drove up to the Amoco station in his Maxima. The defendant stayed in the store a short time, and when he came out, Mr. Johnson approached him and asked him if he had anything for sale. Mr. Johnson then got into the defendant's car and asked him for crack cocaine. He purchased "two pieces" of crack cocaine for $30 from the defendant. After the defendant left, Mr. Johnson went to the rendezvous place where Officer Poston picked him up. He was searched again, and the officers took the drugs from him.

The defendant chose not to testify.

At the conclusion of the trial, the jury convicted the defendant of one charge of selling less than .5 grams of cocaine. The defendant now appeals, alleging that there was insufficient evidence to support the conviction, that the police and state engaged in outrageous conduct in their dealings with the defendant because of their conduct with him through Mr. Johnson, that the trial court erred in failing to dismiss the charges because of the State's failure to comply with discovery, and that the trial court erred in not indicating when the defendant's sentence should begin if it was to run consecutively to his two prior sentences.

I. Sufficiency Of The Evidence

The defendant first alleges that the evidence was insufficient to support his conviction. When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). The rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *Winters*, 137 S.W.3d at 654.

In determining the sufficiency of the evidence, this court should neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id.* at 655. Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

"It is an offense for a defendant to knowingly . . . sell a controlled substance." T.C.A. § 39-17-417(a)(3) (2003). If the substance is cocaine and weighs less than .5 grams, the offense is a Class C felony. T.C.A. § 39-17-417(c)(2)(A).

Viewing the evidence in the light most favorable to the State, we find that the evidence was sufficient to convict the defendant of the sale of less than .5 grams of cocaine. Mr. Johnson, the confidential informant, orchestrated the sale of cocaine with the defendant in the Amoco parking lot. The events were witnessed and recorded by Officer Poston and Officer Yook. Mr. Johnson was searched prior to being dropped off at the Amoco to confirm he had no drugs on his person, and when he was picked up by the officers after the transaction, they recovered a substance later identified as .3 grams of cocaine. Accordingly, we find that the evidence was sufficient to support the defendant's conviction of the sale of less than .5 grams of cocaine.

II. The Claim of Outrageous Conduct

The defendant next alleges that the police and State engaged in outrageous conduct in their dealings with the defendant because of their conduct with him through Mr. Johnson. We need not belabor this argument, because it is presented for the first time on appeal and therefore waived. *See*, *e.g.*, Tenn. R. App. P. 36; *State v. Johnson*, 970 S.W.2d 500, 508 (Tenn. Crim. App. 1996) ("Issues raised for the first time on appeal are considered waived.").

III. The Trial Court's Denial of Defendant's Motion For A Mistrial

The defendant next alleges that the trial court erred in denying his motion for a mistrial. The motion was based on Officer Yook's testimony that Melvin Johnson had signed and filled out a "confidential informant packet," which was not provided to the district attorney's office or the defendant before trial. The packet, which was subsequently entered into evidence at trial, contained biographical information on Mr. Johnson and three form documents signed by Officer Yook and Mr. Johnson: a "code of conduct" for confidential sources, a "permission to intercept oral communication" when Mr. Johnson wore an electronic listening device, and a release form relieving the city of Oak Ridge of liability should it be necessary to simulate the arrest of Mr. Johnson to protect his status as a confidential informant. The defendant filed three pre-trial motions related to discovery: a motion to compel disclosure of exculpatory evidence, a motion to compel the disclosure of the existence and substance of promises of immunity, leniency, or preferred treatment, and a *Brady* motion for any "favorable" information that would impeach Melvin Johnson's credibility as an informant, *see Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963). The defendant alleged that not having the packet caused "grievous harm" to his trial preparation. The State claims that the motion for a mistrial was properly denied.

Whether to grant a mistrial is an issue entrusted to the sound discretion of the trial court. *See State v. McKinney*, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). "Generally, a mistrial will be declared in a criminal case only when there is a 'manifest necessity' requiring such action by the trial judge." *State v. Millbrooks*, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). On appeal, this court will disturb a trial court's denial of a motion for mistrial only when there is an abuse of

discretion. *State v. Adkins*, 786 S.W.2d 642, 644 (Tenn. 1990); *State v. Williams*, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

Tennessee Rule of Criminal Procedure 16(a)(1)(F) provides,

> Documents and Objects. - Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, if the item is within the state's possession, custody, or control and:
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> (i) the item is material to preparing the defense;
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> (ii) the government intends to use the item in its case-in-chief at trial; or
>
> (iii) the item was obtained from or belongs to the defendant.

Tenn. R. Crim. P. 16(a)(1)(F).

When a party fails to comply with a discovery request, "the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." Tenn. R. Crim. P. 16(d)(2). Whether a defendant has been prejudiced by the state's failure to disclose information is a significant factor in determining an appropriate remedy. *State v. Smith*, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995). The relevant inquiry is what prejudice has resulted from the discovery violation, not simply the prejudicial effect the evidence, otherwise admissible, had on the issue of a defendant's guilt. *State v. Ronald Mitchell*, No. 02C01-9702-CC-00070 (Tenn. Crim. App., Jackson, Sept. 15, 1997) (citing *State v. Cottrell*, 868 S.W.2d 673, 677 (Tenn. Crim. App. 1992); *State v. Garland*, 617 S.W.2d 176, 185-86 (Tenn. Crim. App. 1981)). "This court will not presume prejudice from a mere allegation." *State v. Quincy L. Henderson*, No. 02C01-9706-CR-00227, slip op. at 10 (Tenn. Crim. App., Jackson, May 12, 1998). Exclusion of evidence is a "drastic remedy and should not be implemented unless there is no other reasonable alternative." *Smith*, 926 S.W.2d at 270.

In *Brady*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97. To prove a *Brady* violation, a defendant must demonstrate (1) that he requested the information (unless the evidence is obviously exculpatory, in which case the state is bound to release the information whether requested or not), (2) that the State suppressed the information, (3) that the information was favorable to the defendant, and (4) that the information was material. *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001). The evidence is deemed material if "there is a reasonable probability that, had the evidence been disclosed to the

defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985).

We see no abuse of discretion in the denial of the motion for a mistrial. We fail to see how the confidential informant packet was discoverable under Tennessee Rule of Criminal Procedure 16(a)(1)(F); it was not material to the defendant's defense and was not used by the State as part of its case-in-chief, and certainly was not the property of the defendant. We agree with the finding of the trial court that the confidential informant packet was "simply an acknowledgment of a confidential source code of conduct."

Regardless of whether the confidential informant packet was discoverable, we agree with the trial court's finding that the defense suffered no prejudice by the late discovery of the packet. After the disclosure of the existence of the packet, the trial was halted, and both sides were given time to inspect its contents. Neither party moved for a recess or the exclusion of the evidence. Following its own examination of the evidence, the trial court concluded that "[t]here is not a written statement in here; its simply an acknowledgment of a confidential source code of conduct . . . I fail to see how having this in your hand now has harmed your client by not having it in hand when those questions concerning those same issues have been asked and answered." Furthermore, the trial court allowed the defense to recall witnesses who had already testified to question them about any issues related to the confidential informant packet. We agree with the finding of the trial judge, who found that the defendant had not been prejudiced.

Finally, the defendant's argument of a *Brady* violation fails because *Brady* requires only the disclosure of exculpatory evidence. *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97. We agree with the finding of the trial court that the confidential source packet did not contain exculpatory evidence.

Given the lack of prejudice in this instance, the decision to deny the motion for a mistrial was not an abuse of discretion and is affirmed.

IV. Issues of Sentencing

The defendant's final claim is that "the trial court erred in sentencing enhancement and consecutive sentencing," although it is clear from the language of the brief that the defendant is actually challenging the failure of the trial court to indicate exactly when his sentence for this conviction will begin in light of the defendant's two prior convictions. However, the trial court cannot determine when these other sentences will expire because "the department of correction [is] responsible for calculating the sentence expiration date and the earliest release date of any felony offender sentenced to the department of correction." T.C.A. § 40-28-129 (2006). Therefore, this issue is not within judicial purview and is without merit on appeal.

V. Conclusion

Sufficient evidence supports the defendant's conviction of selling less than .5 grams of cocaine, and the trial court did not err in denying the defendant's motion for a mistrial or in failing to indicate exactly when his sentence for this charge would begin. The allegation of "outrageous conduct" is raised for the first time on appeal and is therefore waived on appeal. Accordingly, the judgment of the trial court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE